UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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TOWN OF OYSTER BAY,

Plaintiff,

- against -

NORTHROP GRUMMAN SYSTEMS CORPORATION, formerly known as Northrop Grumman Corporation, THE UNITED STATES NAVY, and THE UNITED STATES OF AMERICA,

Defendants.
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Civil Action
No. CV- 05-1945

(Platt, J.)
(Tomlinson, M.J.)

FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION

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PRELIMINARY STATEMENT

Defendants United States of America and the United States Navy (hereinafter collectively "Federal Defendants") respectfully submit this memorandum of law in opposition to Plaintiff's second motion for reconsideration of the Court's Memorandum & Order of May 14, 2009 ("May 14, 2009 Decision") (Docket No. 94), wherein the Court held, inter alia, that Plaintiff had failed to comply with the National Contingency Plan ("NCP") requirements of the Superfund law and therefore could not recover its remediation costs.

In its second effort to obtain reconsideration of the Court's May 14, 2009 Decision, Plaintiff essentially argues that the Second Circuit's decision in Niagara Mohawk Power Corp. v. Chevron U.S.A. Inc., 596 F.3d 112 (2d Cir. 2010) ("*Niagara Mohawk*"), is "an intervening change of controlling law" that warrants revision of the decision. See Plaintiff's Memorandum in Support of Reconsideration, dated October 14, 2010 (hereinafter "Pl's Second Recon. Br.") at 3.[1] The *Niagara Mohawk* decision was issued nearly eight months before the Plaintiff served its second motion for reconsideration and while Plaintiff's first motion for reconsideration was pending, but the Plaintiff did nothing to advocate this position until filing its second motion for reconsideration. As such, as a threshold issue, Plaintiff's second motion for reconsideration should be denied because the motion is untimely.

Further, even if the Court reaches the merits of Plaintiff's second motion for reconsideration, it should be denied because the Second Circuit's decision in *Niagara Mohawk* does not provide a valid basis for the Court to reconsider the correct determinations in its May 14, 2009 Decision that Plaintiff's remediation costs are not recoverable.

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[1] In violation of Local Civil Rule 6.3, plaintiff filed an affidavit in support of its motion. See Declaration of Janice McGuckin-Greenberg, dated October 14, 2010. Local Civil Rule 6.3 provides that "[n]o affidavits shall be filed by any party unless directed by the court." Local Civil Rule 6.3 of the Local Civil Rules of the United States District Court for the Southern and Eastern Districts of New York.

THE COURT'S MAY 14, 2009 MEMORANDUM AND ORDER

On May 14, 2009, the Court issued a 63-page Memorandum and Order granting Defendants' summary judgment motions against Plaintiff, and denying Plaintiff's summary judgment motions against Defendants. In relevant part, the Court ordered that Plaintiff's cost recovery claim under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.*, be dismissed with prejudice because Plaintiff had failed to "substantially comply with the [National Contingency Plan's] requirements that a private party select a cost-effective remedy, evaluate alternative remedies, reevaluate alternative remedies after the public comment period has ended, and adequately document its costs and demonstrate that said costs were necessary." See May 14, 2009 Decision at 46-47. Plaintiff moved for reconsideration of that decision, and on March 31, 2010, the Court denied the motion. See Docket Nos. 105 and 106. Plaintiff now moves again for reconsideration of the May 14, 2009 Decision under Local Civil Rule 6.3 and Federal Rule of Civil Procedure 54(b).

STANDARD OF REVIEW FOR MOTION FOR RECONSIDERATION

Under the governing standard, reconsideration will be denied unless the moving party can demonstrate that there was: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. See Medoy v. Warnaco Employees' Long Term Disability Ins. Plan, No. 97-CV-6612, 2006 U.S. Dist. LEXIS 7635, at *4 (E.D.N.Y. Feb. 14, 2006) (Johnson, J.). Courts narrowly construe this standard and apply it strictly against the moving party "to dissuade parties from relitigating issues that have already been fully considered by the Court," id. at *4, and "to prevent a losing party from 'examining a decision and then plugging the gaps of the lost motion with additional matters.'" Alvarado v. City of New York, No. 04-CV-2558, 2006 U.S. Dist. LEXIS 72065, at *2 (E.D.N.Y. Oct. 3, 2006) (citations omitted); Concepcion v. United States, 328 F. Supp. 2d 372, 374 (E.D.N.Y. 2004) (Spatt, J.) (the standard for granting reconsideration is "strict"). The decision to grant or deny such a motion is within the sound discretion of the district court. See Medoy, 2006 U.S. Dist. LEXIS 7635, at *4.

A motion for reconsideration "is not a vehicle for relitigating old issues, presenting the same case under new theories, securing a rehearing on the merits or otherwise taking a 'second bite at the apple.'" Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998) (internal citations omitted). The Second Circuit has "limited district courts' reconsideration of earlier decisions under Rule 54(b) by treating those decisions as law of the case[. This] gives a district court discretion to revisit earlier rulings in the same case, subject to the caveat that 'where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" Official Comm. Of Unsecured Creditors of Color Tile v. Coopers & Lybrand LLP, 322 F.3d 147, 167 (2d Cir. 2003). This standard is similarly applicable to motions for reconsideration under Local Civil Rule 6.3. See, e.g., Silverman v. Wachovia Bank, N.A., No. 09-CV-1371, 2010 U.S. Dist. LEXIS 129006, at *11-13 (E.D.N.Y. Dec. 3, 2010) (Feuerstein, J.); Hinds County, Miss. v. Wachovia Bank, N.A., 708 F. Supp. 2d 348, 369 (S.D.N.Y. 2010). As one court aptly held, "reconsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." In re Health Mgmt. Sys. Inc. Sec. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (citation omitted); see Nakshin v. Holder, No. 09-CV-1676, 2010 U.S. App. LEXIS 654, at *2, 360 Fed. Appx. 192, 193 (2d Cir. 2010) ("The threshold for prevailing on a motion for reconsideration is high. Generally, motions for reconsideration are not granted unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court. In addition, a motion for reconsideration is not favored and is properly granted only upon a showing of exceptional circumstances." (internal citations and quotation marks omitted)); Schrader v. CSX Transp. Inc., 70 F.3d 255, 257 (2d Cir. 1995) (same).

As set forth in further detail below, because Plaintiff's second motion for reconsideration fails to identify any legal or factual error that meets the strict standard for reconsideration; accordingly, the motion should be denied.

ARGUMENT

POINT I

PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION SHOULD BE DENIED BECAUSE IT IS NOT TIMELY

Plaintiff moves pursuant to Local Civil Rule 6.3 and Rule 54(b) of the Federal Rules of Civil Procedure for reconsideration of this Court's May 14, 2009 Decision. See Pl.'s Notice of Motion, dated October 14, 2010; Pl's Second Recon. Br. at 1. Local Rule 6.3 requires that a "notice of motion for reconsideration or reargument of a court order determining a motion shall be served within fourteen (14) days after the entry of the court's determination of the original motion." See Local Civil Rule 6.3. The time period for seeking reconsideration under Local Rule 6.3 and seeking revision of a decision before entry of final judgment pursuant to Fed. R. Civ. P. 54(b) are virtually the same. See Rispler v. Sol Spitz Co., No. 04-CV-1323, 2006 U.S. Dist. LEXIS 75840, at *5-6 (E.D.N.Y. Oct. 18, 2006) (Irizarry, J.) ("under most circumstances (and unless the court specifically directs otherwise) motions for reconsideration of a court order [pursuant to Fed. R. Civ. P. 54(b)] must be made within [the time period required by Local Civil Rule 6.3]"); Church of Scientology Int'l v. Time Warner, Inc., No. 92-CV-3024, 1997 U.S. LEXIS 12839, at *13-14 (S.D.N.Y. Aug. 27, 1997) (same), aff'd sub. nom. Church of Scientology Int'l v. Behar, 238 F.3d 168 (2d Cir. 2001).

The sole basis for Plaintiff's second motion for reconsideration is Plaintiff's contention that the Second Circuit's decision in *Niagara Mohawk* represents an intervening change of controlling law affecting the Court's May 14, 2009 Decision. See Pl's Second Recon. Br. at 3. *Niagara Mohawk* was decided on February 24, 2010. By filing its reconsideration motion on October 14, 2010, nearly eight months after the decision was issued, Plaintiff completely disregarded the timeliness requirement of Local Rule 6.3. For this reason alone, Plaintiff's second motion for reconsideration should be denied.

Moreover, when the Second Circuit issued the *Niagara Mohawk* decision in February 2010, Plaintiff's first motion for reconsideration was pending. Plaintiff nevertheless failed to supplement its first motion for reconsideration with its arguments concerning the *Niagara Mohawk* decision at any time before the Court denied Plaintiff's first motion for reconsideration on March 31, 2010. This would have been in the interest of judicial efficiency, in that it would have permitted the Court to consider Plaintiff's supplemental arguments at the same time that it was considering Plaintiff's other arguments concerning compliance with the NCP. Instead, Plaintiff did not submit arguments regarding *Niagara Mohawk* until it filed the instant second motion for reconsideration seven months after the Court had denied its first reconsideration motion. To ask the Court yet again to reconsider its decision fails to comply with both the letter and the spirit of the rules governing motions for reconsideration, in that, among other things, it is contrary to the finality principle that governs such motions, and considerably strains the scarce resources of the Court and the parties.

For these reasons and for the reasons set forth in Point I of Northrop Grumman

Systems Corporation's opposition to Plaintiff's second motion for reconsideration, dated December 17, 2010 ("Northrop Grumman's Opposition Br. to Pl's Second Recon. Motion"), at 1-2, which the Federal Defendants incorporate by reference, Plaintiff's second motion for reconsideration should be denied.

POINT II

THE *NIAGARA MOHAWK* DECISION DOES NOT PROVIDE A VALID BASIS FOR THE COURT TO RECONSIDER ITS CORRECT DETERMINATION THAT PLAINTIFF'S COSTS ARE NOT RECOVERABLE UNDER CERCLA

Plaintiff's argument that reconsideration is warranted by the Second Circuit's decision in *Niagara Mohawk* should be rejected. Here, Plaintiff's contention of consistency with the NCP based on its interpretation of the decision in *Niagara Mohawk* is refuted because this Court correctly determined that, based on undisputed facts, Plaintiff had failed to comply with several requirements of the NCP. See May 14, 2009 Decision at 52-60; see also 42 U.S.C. § 9607(a)(4)(B); 40 C.F.R. § 300.700(c)(2); E.I. Dupont De Nemours & Co. v. United States, 508 F.3d 126, 135 (3d Cir. 2007) ("By the plain text of the [CERCLA] statute, a party that seeks recovery for costs incurred in a cleanup that does not comport with the national contingency plan is without recourse"); Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 799-800 (9th Cir. 1995). The *Niagara Mohawk* decision does not change the law applicable to the undisputed facts that the Court correctly found herein. As such, Plaintiff's efforts to recharacterize the decision as "intervening, controlling law" should be seen for what it really is: yet another attempt to relitigate old issues that the Court has already decided against Plaintiff twice – once, in its original decision, and then again on the denial of Plaintiff's first motion for reconsideration.

For example, the Court recognized that a remediation plan must be cost-effective to be consistent with the NCP. See May 14, 2009 Decision at 54-57. The Court correctly determined, among other things, that the undisputed facts had demonstrated that Plaintiff's remediation plan was not cost-effective, in that: (a) NYSDEC had not approved of Plaintiff's $22 million Remediation Alternative 4; (b) Plaintiff had refused to comply with NYSDEC's recommendation that it implement a different plan – Remediation Alternative 2; and (c) Plaintiff "at its own election and being at liberty to do so . . . chose to go beyond alternative 2" and implemented an expensively excessive and unnecessary cleanup plan that NYSDEC would not approve. See May 14, 2009 Decision at 55-57. The *Niagara Mohawk* decision does not require a Court to disregard its factual findings that a private party's remediation plan was not cost-effective and therefore failed to comply with the NCP.

The Court also correctly recognized, among other things, that "[t]he NCP requires private parties to evaluate alternatives prior to selecting a remedy. . . . [and the] [f]ailure to consider other remedies is inconsistent with the NCP." See May 14, 2009 Decision at 57-59 (citing 40 C.F.R.§ 300.430(d)-(e)). The Court aptly held that "[i]f a plaintiff was not required to meaningfully evaluate alternative remedies to ensure that they are protective of human health and the environment, as well as cost effective, this provision of CERCLA would be pointless." See id. at 58; see also Sealy Connecticut, Inc. v. Litton Indus., Inc., 93 F. Supp. 2d 177, 183-86 (D. Conn. 2000) ("Congress established important procedural safeguards in the NCP as a means of ensuring that the remedy selected is appropriate and cost effective, . . . These procedural safeguards provide discipline to an otherwise potentially free wheeling process and greatly facilitate subsequent judicial review of recoverable CERCLA remediation costs"); United States v. A & N Cleaners and Launderers, Inc., 854 F. Supp. 229, 232 n.2 (S.D.N.Y. 1994) ("A party responsible for cleaning up a contaminated site is required by various provisions of CERCLA to arrange to have an RI/FS performed, which evaluates the extent of the contamination problem and evaluates alternative proposed remedies at the site."). Applying the law to this case, *inter alia,* the Court found the following:

> First, the only remedy contained in plaintiff's November 2005 submission to the DEC is what came to be known as Remedial Alternative 4. As plaintiff's Rule 30(b)(6) designee and chief project engineer Matthew Russo testified, plaintiff submitted alternative remedies only after the DEC directed it to do so. Mr. Russo also testified that the idea of implementing an alternative remedy came up "once or twice" but that the Town's goal all along was to implement Remedial Alternative 4.
>
> Furthermore, the Rule 30(b)(6) designee for plaintiff's engineering consulting firm, H2M, admitted that it did not reconsider its recommendation that plaintiff implement alternative 4, even after receipt of the DEC's May and October 2006 correspondence which advised plaintiff to evaluate alternative remedies to ensure selection of a "cost-effective remedy." Instead, plaintiff opted to implement a remedy costing at least three times more than an alternative remedy which the DEC indicated would be fully protective of human health and the environment, *i.e.*, Remedial Alternative 2, without purposeful consideration.

See May 14, 2009 Decision at 58-59. The *Niagara Mohawk* decision does not require a Court to ignore the fact that a private party failed to evaluate remedial alternatives, as required by the NCP.

Neither does the *Niagara Mohawk* decision require a Court to ignore other facts that demonstrate non-compliance with the NCP. For example, the Court correctly found the following additional reasons that Plaintiff's costs were unrecoverable:

- **Plaintiff Failed to Evaluate Alternative Remedies After Public Comment.** The Court recognized that the NCP required Plaintiff to reassess its initial identification of the remedial alternative it preferred in light of points of view expressed during the public comment period. See May 14, 2009 Decision at 59 (citing 40 C.F.R. 300.430(f)(ii)(B)(4)(i) (2007)). The Court correctly determined that in light of Plaintiff's admissions "that it did not reconsider its strategy to implement Remedial Alternative 4 after receiving the DEC's May and October 2006 correspondence, it is clear that plaintiff did not, in further contravention of the NCP, 'reassess its initial determination that the preferred alternative' remained the best course of action after the public comment period ended." See May 14, 2009 Decision at 59.

- **Plaintiff Failed to Adequately Document Its Costs.** The Court also recognized that "[t]he NCP requires a private party to adequately document its costs in support of a claim for recovery." See May 14, 2009 Decision at 59-60 (citing 40 C.F.R. § 300.160(a)(l)); see also United States v. Hardage, 982 F.2d. 1436, 1442 (10th Cir. 1992); United States v. E.I. du Pont de Nemours & Co., 341 F. Supp. 2d 215, 244 (W.D.N.Y. 2004) ("Under the NCP, Plaintiff was required to maintain documentation that 'in general' is 'sufficient' to provide an 'accurate accounting' of the costs incurred."); City of Wichita v. Trustees, 306 F. Supp. 2d 1040, 1096 (D. Kan. 2003) ("In order to recover response costs under CERCLA, a plaintiff must maintain an 'accurate accounting' of costs."). The Court found that Plaintiff had not substantially complied with the NCP cost-documentation requirements because it "has not submitted any admissible evidence of documentation of its costs. See May 14, 2009 Decision at 60.

See also the following prior submissions, which the Federal Defendants incorporate by reference: (i) memorandum of law in support of their motion for summary judgment (Docket No. 64); (ii) memorandum of law in opposition to Plaintiff's motion for summary judgment (Docket No. 70); (iii) memorandum of law in opposition to the Plaintiff's first motion for reconsideration (Docket No. 103); and (iv) Northrop Grumman's Opposition Br. to Plaintiff's Summary Judgment Motion, Point I.C. at 13-17 (Docket No. 69).[2]

This Court need not determine whether there could ever be a specific circumstance in which a state's compliance with the NCP and a state's approval and oversight of a private party's remediation plan could possibly be evidence that a private party could attempt to use in support of an argument that it had complied with the NCP, because that is not the case here. Where, as here, the Court correctly found, *inter alia,* that NYSDEC had expressly warned that the Town's plan was not necessary, was not cost effective, and was one that NYSDEC would never require or implement, the *Niagara Mohawk* decision cannot be read to compel a conclusion that Plaintiff had complied with the NCP. See, e.g., Amland Properties Corp. v. Aluminum Co. of America, 711 F. Supp. 784, 794, 800 n.18 (D.N.J. 1989); Artesian Water Co. v. Government of New Castle Cty, 659 F. Supp. 1269, 1297-99 (D. Del. 1987), aff'd, 851 F.2d 643 (3d Cir. 1988); see also Carson Harbor Village v. County of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2006); Washington State Dep't of Transp., 59 F.3d at 800. As Northrop Grumman aptly states in its brief in opposition to the instant motion, the *Niagara Mohawk* decision does not require this Court to ignore the undisputed facts demonstrating the Town's inconsistency with the NCP merely because NYSDEC did not block the Town, as the owner of the Park Property, from implementing an excessively expensive plan "at its own election." See Northrop Grumman's Opposition Br. to Pl's Second Recon. Motion at 3.

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[2] Federal Defendants' "incorporations by reference" include those specifically-identified "incorporations by reference" of sections of Northrop-Grumman's briefs that are set forth in Federal Defendants' briefs.

In sum, the *Niagara Mohawk* decision does not provide a basis for the Court to reconsider its correct findings that Plaintiff had failed to comply with the National Contingency Plan and Plaintiff's failure otherwise to demonstrate that its costs were recoverable.

POINT III

THERE IS NO BASIS TO RECONSIDER THE COURT'S DECISION THAT PLAINTIFF'S COSTS WERE NOT RECOVERABLE ON GROUNDS OTHER THAN NON-COMPLIANCE WITH THE NCP

In its second motion for reconsideration, Plaintiff failed to address the Court's rulings that Plaintiff's costs were not recoverable under CERCLA on grounds independent from its non-compliance with the NCP. See May 14, 2009 Decision at 60; see also Sealy Connecticut, Inc., 93 F. Supp. 2d at 187 (independent of NCP compliance, court found only "necessary" remediation costs may be recovered under CERCLA). Thus, Plaintiff additionally cannot meet its strict burden on reconsideration to show that this Court would have changed its decision on these other sufficient, independent grounds for its conclusion that Federal Defendants are not liable for the Plaintiff's costs under CERCLA. See Nakshin v. Holder, 2010 U.S. App. LEXIS 654, at *2; Schrader v. CSX Transp. Inc., 70 F.3d at 257.

The Court recognized that Plaintiff was required to demonstrate that its costs were not "necessary costs of response" under CERCLA, 42 U.S.C. § 9607(a)(4)(B). See May 14, 2009 Decision at 60. The Court found that Plaintiff's costs were not "necessary costs of response," "given that it [had] spent millions of dollars to address risks which did not even exist." Id. Nothing in the *Niagara Mohawk* case suggests that a private party may recover cleanup costs found not to be "necessary response costs" under CERCLA. Plaintiff's second motion for reconsideration should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, defendants United States of America and United States Navy respectfully request that the Court deny plaintiff's second motion for reconsideration, and grant such other and further relief as it deems just and proper.

Dated: Central Islip, New York
December 17, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of copies of the foregoing **FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION,** has this 17th day of December, 2010, been made on the parties by first class mailing, a copy thereof, in a postage prepaid envelope, to the following addresses:

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